

**BEFORE THE ILLINOIS COMMERCE COMMISSION**

**Docket No. 12-0182**

**Rebuttal Testimony of Mark Neinast**

**On Behalf of AT&T Illinois**

**AT&T Illinois Exhibit 2.1**

**May 25, 2012**

1 I. INTRODUCTION

2 Q. PLEASE STATE YOUR NAME.

3 A. My name is Mark Neinast.

4 Q. ARE YOU THE SAME MARK NEINAST WHO SUBMITTED DIRECT  
5 TESTIMONY IN THIS MATTER ON APRIL 24, 2012?

6 A. Yes.

7 Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?

8 A. I will respond to some assertions in the pre-filed direct testimony of Halo witnesses Russ  
9 Wiseman and Robert Johnson that relate to the issues I discussed in my direct testimony.  
10 I will be selective, however, because I believe that much of what Halo's witnesses say  
11 warrants no response.

12 Q. WHY DO YOU SAY THAT MUCH OF WHAT HALO'S WITNESSES SAY  
13 WARRANTS NO RESPONSE?

14 A. The AT&T Illinois claim I discussed in my direct testimony is straightforward: Halo is  
15 breaching the parties' ICA by sending AT&T Illinois landline-originated traffic, which  
16 the ICA does not permit. To decide that claim, the Commission must answer only three  
17 questions.

18 The first question is whether Halo is sending AT&T Illinois calls that are made by  
19 calling parties using landline equipment, and the answer to that question is "yes." Given  
20 that, the only defense Halo has asserted is that all of those landline-originated calls are  
21 converted into wireless-originated calls when they pass through Transcom, because  
22 Transcom, according to Halo, is an Enhanced Service Provider ("ESP") that terminates

every call that comes its way and then originates a further communication to AT&T Illinois.

In considering Halo's defense, the Commission must answer two additional questions: (i) whether Transcom is an ESP, as Halo contends, and (ii) if Transcom is an ESP, does that mean it originates every call that passes through its equipment, as Halo also contends? If the answer to either of those questions is "no" (and AT&T Illinois maintains that the answer to *both* questions is "no") the Commission must conclude that Halo has breached its contract with AT&T Illinois.

Mr. Wiseman and Mr. Johnson discuss many things that it seems to me have no bearing on any of those questions. I suspect this may be because Halo has decided to throw as many things at the wall as it can think of to see if anything sticks. In any event, I will devote little space to assertions of Halo's witnesses that are not pertinent to the issues the Commission must decide.

**Q. WHAT ARE THE ANSWERS TO THE THREE QUESTIONS YOU IDENTIFIED ABOVE?**

A. There is no disagreement about the answer to the first question: Our call studies conclusively demonstrate that Halo is sending AT&T Illinois substantial volumes of landline-originated traffic. I indicated in my direct testimony that Halo would quibble about our numbers, and Halo does so in Mr. Wiseman's testimony. I respond briefly to those quibbles. At the end of the day, however, they make no difference, because Halo does not deny it is delivering significant amounts of traffic that originates on landline

44 equipment, and for purposes of this case, it does not matter exactly what percentage of  
45 Halo's traffic is landline-originated.

46 The question then becomes whether Transcom is an ESP and, if it is, whether that  
47 means that every call that passes through Transcom on its way to AT&T Illinois is re-  
48 originated by Transcom. As I stated in my direct testimony, those are ultimately legal  
49 questions. Halo has chosen to set forth its legal arguments in its testimony. As a result,  
50 much of Mr. Wiseman's testimony is really a legal brief that Mr. Wiseman recites "on the  
51 advice of counsel."<sup>1</sup> AT&T Illinois will not adopt this approach, but instead will present  
52 its legal arguments in its legal briefs. To give the Commission some sense of AT&T  
53 Illinois' position on the legal issues, however, I will make a few general points "on the  
54 advice of counsel."

55 **Q. ARE THERE OTHER REASONS THAT YOUR REBUTTAL TESTIMONY IS**  
56 **LIMITED?**

57 **A.** Yes. My direct testimony anticipated many of the points that Halo's witnesses make in  
58 their testimony. In some instances, I will respond to Halo's testimony by referring the  
59 Commission to my direct testimony.

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<sup>1</sup> There are at least 36 instances in which Mr. Wiseman explicitly states that he is expressing a view of the law on the advice of counsel. Pre-Filed Testimony of Russ Wiseman on Behalf of Halo Wireless, Inc. ("Wiseman Testimony") at 25:3, 10, 16; 32: 11, 15, n.6; 33:3, 10, 12, n.7; 36:13; 37:8; 39:22; 40:2; 44:8, 11; 45:16; 46:15, 16; 47:1, 2, 4, 9, 12, 14, n.22; 48:17, 20, 21; 49:11, n.23; 50:4, n.24; 58:22, 60:n.26; 61:n.27.

60 **Q. HOW IS YOUR REBUTTAL TESTIMONY ORGANIZED?**

61 A. This introductory discussion is followed by five more sections. Section II responds to  
62 two over-arching assertions made by Mr. Wiseman. Section III further demonstrates that  
63 much of the traffic Halo is delivering to AT&T Illinois originates on landline equipment.  
64 Sections IV and V address Halo's defense that Transcom is an ESP that re-originates all  
65 the calls that pass through it on the way to AT&T Illinois. Finally, Section VI addresses  
66 Halo's improper alteration of call detail.

67 **II. OVERARCHING POINTS**

68 **Q. MR. WISEMAN STATES THAT THE ASSERTIONS IN YOUR DIRECT**  
69 **TESTIMONY, AND SCOTT MCPHEE'S, ARE "FOUNDED ON TRADITIONAL**  
70 **INTERPRETATIONS AND APPLICATIONS OF THE TERMS 'WIRELESS'**  
71 **AND 'ORIGINATED.'"<sup>2</sup> HOW DO YOU RESPOND?**

72 A. The terms "wireless" and "originated" mean exactly the same thing today as they have  
73 "traditionally" meant, and Mr. Wiseman does not say anything that suggests otherwise.  
74 To be sure, technology has changed, and the changes include new applications of  
75 wireless and landline equipment. But those new applications do not change the meaning  
76 or use of the terms "wireless" and "originated." Mr. Wiseman's observation that my  
77 assertions are founded on traditional views of those two terms, therefore, is an  
78 acknowledgment that AT&T Illinois' position in this case is soundly based on well-  
79 settled principles.

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<sup>2</sup> Wiseman Testimony at 26, lines 17-18.

80 **Q. MR. WISEMAN ALSO ASSERTS THAT AT&T ILLINOIS IS “ASKING THE**  
81 **COMMISSION TO ASSUME AWAY HOW THE INDUSTRY ACTUALLY**  
82 **OPERATES TODAY, HOW CURRENT TECHNOLOGY CAN BE USED AND IS**  
83 **USED, AND MOST IMPORTANT, THE WAY THAT USERS ARE ACTUALLY**  
84 **EMPLOYING THIS TECHNOLOGY TO COMMUNICATE.”<sup>3</sup> IS THAT**  
85 **CORRECT?**

86 **A.** No. AT&T Illinois is asking the Commission to apply the principles that have been in  
87 effect since Halo started delivering traffic to AT&T, and that are still in effect today, to  
88 traffic that is subject to those current rules. Halo’s real grievance seems to be that the  
89 rules have not kept up with technology, at least in Halo’s opinion. For example, Mr.  
90 Wiseman has stated in parallel proceedings in other states, “We also do not believe that  
91 the industry can continue to rely on the ‘calling party number’ as some indicator of where  
92 and on what network a call started.”<sup>4</sup> Perhaps the industry some day will adopt a new  
93 means of determining where a call originates, as Mr. Wiseman evidently believes it  
94 should. But as Mr. Wiseman’s statement acknowledges, the industry today relies on CPN  
95 as the most reliable indicator of where and on what network a call originated.<sup>5</sup> As a  
96 result, Mr. Wiseman’s contention that AT&T Illinois’ call studies are faulty because they  
97 relied on CPN is simply wrong.

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<sup>3</sup> *Id.* at 31, lines 20-22.

<sup>4</sup> See Mr. Wiseman’s testimony from the parallel Wisconsin proceeding, Schedule MN-9, at 30, lines 5-6, and from the parallel Georgia proceeding, Schedule MN-10, at 7, lines 15-17.

<sup>5</sup> Just as Transcom changed its website when it realized the admissions there were undercutting its litigation position (*see* Rebuttal Testimony of J. Scott McPhee on behalf of AT&T Illinois (“McPhee Rebuttal”) at 6, lines 95-111), Mr. Wiseman dropped his statement that the industry should stop relying on CPN after AT&T pointed out in other states that that statement was an acknowledgement that the industry still does rely on CPN. Mr. Wiseman cannot unsay his admission, however.

Furthermore, Mr. Wiseman's ruminations on new technology and Halo's lofty aspirations about promoting the "growth of low cost, high value IP communication services for all Americans"<sup>6</sup> relate only to a red herring – namely, Halo's contention that some of what appears to be landline-originated traffic that Halo delivers to AT&T may actually originate on wireless devices using IP-based services like GoogleVoice and Skype. As I discussed in my direct testimony that contention goes nowhere, because it is inconsistent with current industry standards for identifying the origins of traffic *and* even if it were correct, all that would mean is that a bit less of the traffic Halo is sending AT&T Illinois is landline-originated than the approximately 34% and 60% our initial numbers showed.<sup>7</sup>

**III. HALO IS DELIVERING LANDLINE-  
ORIGINATED TRAFFIC TO AT&T ILLINOIS.**

**Q. YOU SAID IN YOUR INTRODUCTORY COMMENTS THAT EVEN THOUGH THE ICA REQUIRES HALO TO SEND ONLY WIRELESS-ORIGINATED TRAFFIC TO AT&T ILLINOIS, HALO DOES NOT DENY THAT IT IS SENDING AT&T TRAFFIC THAT ORIGINATES AS LANDLINE TRAFFIC. WHAT DO YOU BASE THAT ON?**

**A.** It is not just that Halo does not deny that it is sending us landline-originated traffic; Mr. Wiseman actually admits it. He states, "Most of the calls probably did start on other networks before they came to Transcom for processing. It would not surprise me if some

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<sup>6</sup> *E.g., id.* at 4, lines 5-7.

<sup>7</sup> Direct Testimony of Mark Neinast on Behalf of AT&T Illinois ("Neinast Direct"), at 18, line 364 - 19, line 382.

119 of them started on the PSTN.”<sup>8</sup> The PSTN is the public switched telephone network –  
120 the landline network. So, even though Mr. Wiseman purposefully understated what he  
121 was saying, he is still admitting that Halo is sending AT&T traffic that started as landline  
122 traffic.

123 This clearly is landline-originated traffic, and sending landline-originated traffic  
124 to AT&T (as Halo admittedly does) violates Halo’s contractual commitment to send *only*  
125 “wireless-originated” traffic to AT&T.

126 **Q. WHY DO YOU SAY MR. WISEMAN UNDERSTATED WHAT HE WAS**  
127 **SAYING?**

128 A. In the first place, it is not “most” of the calls that started on other networks; it is *all* of  
129 them. Transcom has no end user customers.<sup>9</sup> Consequently, 100% of the calls that  
130 Transcom hands off to Halo “start on other networks.” Second, Mr. Wiseman’s  
131 statement that it “would not surprise [him] if some of them started on the PSTN” is as  
132 much an understatement as “it would not surprise me if the sun rose tomorrow.” As Mr.  
133 Wiseman admits, “Halo is not in a position to determine where or on what network the  
134 call started, and we have not asked our customer.”<sup>10</sup> In other words, Halo is doing  
135 nothing to try to avoid receiving landline-originated calls and delivering them to AT&T  
136 Illinois, and Mr. Wiseman knows, and effectively admits, that of the more than 19 million

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<sup>8</sup> Wiseman Testimony at 32, lines 5-6.

<sup>9</sup> See, e.g., Pre-filed Testimony of Robert Johnson on Behalf of Transcom Enhanced Services (“Johnson Testimony”), at 8, lines 1-3.

<sup>10</sup> Wiseman Testimony at 32, lines 9-10.



minutes of traffic Halo is delivering to AT&T Illinois every month,<sup>11</sup> a substantial portion necessarily originates on the PSTN.

**Q. WHY IS HALO'S ADMISSION IMPORTANT?**

A. Because it confirms that Halo's critiques of our call studies that showed that Halo is sending us landline-originated traffic are a side-show. At the end of the day, all Halo's critiques amount to is nit-picking about whether the percentage of Halo traffic that is landline-originated is as our call studies showed, or is something less than they showed. For purposes of this case, though, the exact percentages are beside the point; all that matters is that Halo is breaching its contract by sending us substantial amounts of traffic that originates on landline equipment. The *only* defense left to Halo is its untenable argument that all the calls it is delivering to AT&T Illinois are actually wireless calls originated by Transcom's equipment in Illinois, including all the calls that start out as regular landline calls in other states.

**Q. WITH THAT UNDERSTANDING, WILL YOU NONETHELESS ADDRESS SOME OF MR. WISEMAN'S CRITIQUES OF AT&T ILLINOIS' CALL STUDIES?**

A. I will, briefly, but bear in mind that even if some or all of Mr. Wiseman's critiques were well-founded, that would have no effect on the ultimate result in this proceeding. Also bear in mind that Halo has offered no traffic study of its own to dispute the results of AT&T Illinois' traffic analysis – even though Halo has access to all the supporting data for AT&T Illinois' analysis.

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<sup>11</sup> See Direct Testimony of J. Scott McPhee on Behalf of AT&T Illinois ("McPhee Direct"), at 4, lines 89-90.

158 **Q. MR. WISEMAN ARGUES THAT AT&T ILLINOIS' CALL STUDY**  
159 **IMPROPERLY RELIED ON CALLING PARTY NUMBERS ("CPN") TO**  
160 **DETERMINE THE ORIGINATING CARRIER FOR CALLS. IS THAT A VALID**  
161 **CRITICISM?**

162 A. No.

163 **Q. WHY NOT?**

164 A. Mr. Wiseman relies primarily on advanced services like a T-Mobile service that allows  
165 "wireless users to originate calls using wireless base stations connected to wired  
166 broadband networks," and like Verizon Wireless' Home Phone Connect service, which  
167 "allows VZW customers to port their home numbers to VZW and use traditional landline  
168 phones to make calls over their wireless network."<sup>12</sup> His position is that AT&T Illinois'  
169 call analysis would have (or might have) miscategorized calls made using such services.  
170 And to the extent that AT&T Illinois' analysis counts such calls as landline-originated  
171 when they are actually originated with mobile equipment, Mr. Wiseman argues, we have  
172 overstated the percentage of landline-originated calls.

173 My direct testimony addresses these points and explains why Mr. Wiseman is  
174 wrong. The simple fact of the matter is that under current industry standards, the  
175 determinant of whether a carrier is landline or wireless is the Local Exchange Routing  
176 Guide ("LERG"). When our analysis treated a call as landline-originated, that means that  
177 the carrier who holds the originating NPA-NXX for that call identified the NPA-NXX as  
178 landline. Thus, our analysis complied with industry standards, and properly treated as

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<sup>12</sup> Wiseman Testimony at 28, line 11 - 29, line 17.

landline-originated a call that originated on wireless equipment only when the holder of the NPA-NXX for that call identified the NPA-NXX as landline.<sup>13</sup>

To be sure, the NPA-NXX does not in each and every instance accurately reflect actual geographic location. Nonetheless, NPA-NXX is the most reliable indicator we have in the telecommunications industry; it is accurate for the vast majority of calls; and, as the Tennessee Regulatory Authority specifically found in the parallel case there, it is standard, accepted practice in the industry to use NPA-NXX as a proxy for geographic location for landline calls.<sup>14</sup>

Furthermore, Mr. Wiseman makes no attempt to quantify the traffic that Halo delivers to AT&T Illinois that is originated with such advanced services. At the end of the day, then, his testimony on this point establishes *at most* that AT&T Illinois' numbers may be imprecise to some unascertainable (but not demonstrably significant) extent, which, again, makes no difference here.

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<sup>13</sup> Neinast Direct at 18, lines 354-362.

<sup>14</sup> See the TRA's decision, Schedule MN-1 to my direct testimony, at 17: "The Authority acknowledges that a certain degree of imprecision can occur when analyzing the origin to individual telephone calls, due to factors such as the advent of number portability and the growth of wireless and IP telephony. However, because of these technical issues, the industry has developed conventions and practices to evaluate calls for the purpose of intercarrier compensation. The Authority finds that the methodology used to collect the data and the interpretation of the data in the AT&T study are based upon common industry practices to classify whether traffic is originated on wireline or wireless networks."

192 Q. MR. WISEMAN CLAIMS THAT THE FCC SAID IN PARAGRAPHS 934, 960  
193 AND 962 OF ITS *CONNECT AMERICA FUND* ORDER THAT CPN IS AN  
194 UNRELIABLE INDICATOR OF WHERE CALLS ACTUALLY BEGAN.<sup>15</sup> DOES  
195 THIS CAST ANY DOUBT ON YOUR CALL ANALYSIS?

196 A. No, for several reasons. Let's look first at what the FCC actually said in the three  
197 paragraphs of *Connect America Fund*<sup>16</sup> that Mr. Wiseman cites. In that Order, the FCC,  
198 among other things, "adopt[ed] a prospective intercarrier compensation framework for  
199 VoIP traffic."<sup>17</sup> In its discussion of that new framework, the FCC said:

200 [G]iven the recognized concerns with the use of telephone numbers and  
201 other call detail information to establish the geographic endpoints of a call,  
202 we *decline to mandate*, their use in that regard . . . . We do, however,  
203 recognize concerns regarding providers' ability to distinguish VoIP-PSTN  
204 traffic from other traffic, and . . . we permit LECs to address this issue  
205 through their tariffs, much as they do with jurisdictional issues today.<sup>18</sup>

206 As it continued its discussion of the prospective intercarrier compensation  
207 framework for VoIP-PSTN traffic, the FCC repeated that point two more times, stating,  
208 "Because telephone numbers and other call detail information *do not always* reliably  
209 establish *the geographic endpoints of a call*, we do not mandate their use,"<sup>19</sup> and, "[W]e  
210 *do not require* the use of particular call detail information to dispositively distinguish toll

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<sup>15</sup> Wiseman Testimony at 28, lines 3-7.

<sup>16</sup> *Connect America Fund*, FCC 11-161, 2011 WL 5844975 (rel. Nov. 18, 2011).

<sup>17</sup> *Id.* ¶ 933.

<sup>18</sup> *Id.* ¶ 934 (emphasis added).

<sup>19</sup> *Id.* ¶ 960 (emphasis added).

211 VoIP-PSTN traffic from other VoIP-PSTN traffic, given the recognized limitations of  
212 such information.”<sup>20</sup>

213 This is hardly the condemnation of CPN that Mr. Wiseman claims to find in the  
214 FCC’s Order. All the FCC actually said is that it was not *requiring* the use of CPN, in  
215 the context of its new, going-forward intercarrier compensation scheme for VoIP-PSTN  
216 traffic, because of concerns that CPN does *not always* reliably establish *the geographical*  
217 *endpoints of a call*. The FCC neither condemned nor prohibited the use of CPN, even for  
218 VoIP-PSTN traffic; it did not say anything at all about the reliability of CPN with respect  
219 to traffic (like much of Halo’s traffic) that is *not* VoIP-PSTN traffic; and, most important,  
220 it did not say anything about the use of CPN to identify whether a call originated on a  
221 landline or wireless network (as opposed to identifying the geographic endpoints of a  
222 call).

223 Recall that the purpose of my call analysis was to confirm that Halo is sending  
224 AT&T Illinois landline-originated traffic in breach of the parties’ ICA. As I have  
225 explained, CPN is a very reliable tool for identifying the carrier that originated calls and  
226 thereby determining whether the call was landline-originated. Moreover, I already  
227 accounted for Mr. Wiseman’s claim that some IP calls may appear to be landline when  
228 they actually are wireless. While I dispute that claim, the re-run of our analysis,  
229 discussed above, shows that even if Mr. Wiseman were correct, it would have very little

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<sup>20</sup>

*Id.* ¶ 962 (emphasis added).

230 impact on the final result, and certainly would not prove that Halo is not sending  
231 significant volumes of landline-originated traffic to AT&T Illinois.

232 **Q. IS IT TRUE, AS MR. WISEMAN STATES, THAT “AT&T WITNESSES HAVE**  
233 **ALSO ADMITTED THAT THEY HAVE NO REAL WAY OF ACCURATELY**  
234 **IDENTIFYING WHETHER A PARTICULAR CALL ACTUALLY**  
235 **‘ORIGINATED’ FROM A ‘WIRELINE’ CUSTOMER OF AN LEC USING A**  
236 **TRADITIONAL PHONE”<sup>21</sup>?**

237 A. Absolutely not. All we have “admitted” – and I will quote my direct testimony on this –  
238 is that “the NPA-NXX does not in each and every instance accurately reflect actual  
239 geographical location.”<sup>22</sup> I then went on to say: “Nonetheless, NPA-NXX is the most  
240 reliable indicator we have in the telecommunications industry; it is accurate for the vast  
241 majority of calls; and it is the standard, accepted practice in the industry to use NPA-  
242 NXX as a proxy for geographic location for landline calls.”<sup>23</sup> Our study demonstrated  
243 beyond any doubt that a substantial portion of the calls Halo is delivering to us originated  
244 on landline equipment, in breach of our interconnection agreement.

245 **Q. WHAT IS YOUR CONCLUSION CONCERNING THE QUESTION WHETHER**  
246 **HALO IS SENDING AT&T ILLINOIS TRAFFIC THAT ORIGINATES ON**  
247 **LANDLINE EQUIPMENT?**

248 A. As I said at the outset, that is not really a question at all. Halo admits it is sending us  
249 traffic that started out on the PSTN. Notwithstanding its contract obligation, Halo is  
250 doing nothing to avoid sending us such traffic; Halo admits it “is not in a position to

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<sup>21</sup> Wiseman Testimony at 27, lines 3-5.

<sup>22</sup> Neinast Direct at 19, lines 392-393.

<sup>23</sup> *Id.* at 19, line 393 - 20, line 396.

determine where or on what network the call started,” and that it has “not asked our customer.”<sup>24</sup> Our call studies showed that much of the traffic is landline-originated. Giving Halo every benefit of the doubt, the percentage may be somewhat less than our studies showed, but for purposes of this case, that makes no difference.

**IV. TRANSCOM IS NOT AN ESP.**

**Q. PLEASE RE-STATE HOW THE QUESTION WHETHER TRANSCOM IS OR IS NOT AN ESP FITS INTO THE PARTIES’ DISPUTE.**

A. As I have explained, Halo is sending AT&T Illinois a substantial amount of traffic that originates on landline networks. That means that Halo is breaching the parties’ ICA unless Halo can somehow persuade the Commission that all of that traffic is “re-originated” when it hits Transcom. To establish that that is the case, Halo must first show that Transcom is an ESP, because Halo’s whole “re-origination” theory rests on the proposition that Transcom is an ESP.

In my direct testimony, I noted that in *Connect America Fund*, the FCC, while fully aware of Halo’s contention that Transcom is an ESP, rejected precisely the argument that Halo is advancing here;<sup>25</sup> Mr. McPhee quoted the FCC’s rejection of Halo’s argument in full.<sup>26</sup>

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<sup>24</sup> Wiseman Testimony at 32, lines 9-10.

<sup>25</sup> Neinast Direct at 23, lines 461-470.

<sup>26</sup> McPhee Direct at 16, line 340 - 18, line 393.

I also explained that while the question whether Transcom is an ESP is ultimately a legal question, I had seen no evidence that Transcom provides enhanced services as I understand that term.<sup>27</sup> And I noted that the Tennessee Regulatory Authority (“TRA”), in the parties’ identical dispute there, concluded that Transcom is not an Enhanced Service Provider, for reasons that track my own, to which I testified in Tennessee,<sup>28</sup> and that the Pennsylvania Public Utility Commission (“PPUC”) likewise ruled that “Transcom’s removal of background noise, the insertion of white noise, [and] the insertion of computer developed substitutes for missing content” – the same functionalities Halo relies on here – do not constitute “enhancements.”<sup>29</sup>

**Q. WHAT DOES HALO’S TESTIMONY SAY ABOUT THE TRA AND PPUC RULINGS THAT TRANSCOM IS NOT AN ESP?**

A. Halo has no answer for the Tennessee decision or the Pennsylvania decision, so Mr. Wiseman and Mr. Johnson ignore them.<sup>30</sup>

Instead of addressing those adverse rulings, Mr. Johnson discusses at great length what he calls Transcom’s “enhanced service platform.”<sup>31</sup> When all is said and done, Mr.

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<sup>27</sup> Neinast Direct at 24, line 493 - 25, line 524.

<sup>28</sup> *Id.* at 26, line 526 - 27, line 551.

<sup>29</sup> *Id.* at 27, lines 553-364.

<sup>30</sup> Neither Mr. Wiseman nor Mr. Johnson makes any mention of the PPUC decision. Their only mention of the TRA decision is Mr. Johnson’s suggestion that the bankruptcy finding Halo relies on deserves at least as much “dignity” as the TRA decision – with no discussion of the merits of the TRA’s decision. Johnson Testimony at 6, lines 21-24. Mr. McPhee explains why the TRA decision is entitled to greater weight than the bankruptcy court finding. *See* McPhee Rebuttal at pp. 16-17.

<sup>31</sup> Johnson Testimony at 7, line 8 - 19, line 4.



283 Johnson spends many pages discussing his “very technical understanding”<sup>32</sup> of a very  
284 simple (and decidedly non-enhanced) aspect of Transcom’s service.

285 **Q. WHAT IS THAT ASPECT OF TRANSCOM’S SERVICE?**

286 A. Transcom claims it improves the audio quality of voice transmissions.

287 **Q. IS IMPROVING THE AUDIO QUALITY OF VOICE TRANSMISSIONS THE**  
288 **PROVISION OF ENHANCED SERVICES?**

289 A. No. For the reasons I discussed in my direct testimony, and that the TRA and the PPUC  
290 found conclusive, that is not the provision of enhanced services.

291 **Q. MR. WISEMAN STATES THAT YOUR ASSERTIONS, AND MR. MCPHEE’S,**  
292 **“ARE FOUNDED ON ...A DISMISSAL OF FEDERAL DECISIONS**  
293 **REGARDING THE NATURE AND RIGHTS OF HALO’S HIGH VOLUME**  
294 **CUSTOMER.”<sup>33</sup> DO YOU KNOW WHAT HE IS REFERRING TO?**

295 A. I believe so. Halo likes to refer to Transcom, which is its one and only paying customer  
296 and which collaborates with Halo to pass off long distance, landline-originated traffic as  
297 local, wireless-originated traffic, as its “high volume customer.” The “federal decisions”  
298 to which Mr. Wiseman is referring are the bankruptcy court decisions that ruled some  
299 years ago that Transcom was an ESP. Mr. Johnson discusses those decisions at some  
300 length, and Halo relies on them heavily.

301 **Q. WHAT IS THE SIGNIFICANCE OF THE BANKRUPTCY RULINGS?**

302 A. That is a question for the lawyers, but I will provide my general understanding of  
303 AT&T’s position: Just as this Commission is not bound by the TRA’s recent decision

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<sup>32</sup> *Id.* at 17, line 9.

<sup>33</sup> Wiseman Testimony at 26, lines 17-19.

304 that Transcom is not an ESP, or the PPUC decision to the same effect, it also is not bound  
305 by the considerably older bankruptcy court decisions. Instead, the Commission should  
306 attach weight to the various decisions to the extent that it finds they are entitled to weight  
307 based on the considerations Mr. McPhee identifies<sup>34</sup> and on the persuasiveness of their  
308 reasoning. This Commission is better equipped than a bankruptcy court, which seldom  
309 sees telecommunications issues or deals with FCC Rules, to decide whether Transcom is  
310 an ESP – and so were the TRA and the PPUC when they did not adopt the bankruptcy  
311 court conclusion and ruled that Transcom is not an ESP. This point seems evident to me  
312 as a layman, and was confirmed for me by the decision of the bankruptcy judge presiding  
313 over Halo’s own bankruptcy to allow this Commission and other state commissions to  
314 determine the merits of these issues in the first instance. AT&T Illinois believes this  
315 Commission will find the reasoning of the two state commissions, especially the TRA,  
316 persuasive.

317 Halo has suggested that AT&T is legally bound by the bankruptcy court  
318 decisions, under a doctrine called “collateral estoppel.” That is a legal issue that I cannot  
319 address, but AT&T will show in its legal briefs why that is incorrect, and that if anyone  
320 were legally bound here, it would be Halo, by the TRA decision on precisely the issues  
321 presented here.

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<sup>34</sup>

McPhee Rebuttal at 16-17.

322 **Q. IS THE ICA LANGUAGE AT ISSUE IN THIS CASE THE SAME LANGUAGE**  
323 **THAT WAS AT ISSUE IN THE TRA DECISION YOU REFERENCE?**

324 A. Yes. The ICA language that the TRA ruled Halo breached is the same ICA language that  
325 is at issue here. Thus, AT&T's claim that Halo breached that ICA has already been  
326 sustained.

327 **V. EVEN IF TRANSCOM WERE AN ESP, THAT DOES NOT**  
328 **MEAN IT RE-ORIGINATES EVERY CALL IT TOUCHES.**

329 **Q. HAS HALO'S TESTIMONY PERSUADED YOU THAT THE LANDLINE-**  
330 **ORIGINATED CALLS THAT HALO DELIVERS TO AT&T ILLINOIS ARE RE-**  
331 **ORIGINATED AS WIRELESS CALLS WHEN THEY PASS THROUGH**  
332 **TRANSCOM'S EQUIPMENT?**

333 A. Not in the slightest. As I explained in my direct testimony, a call is originated only once,  
334 by the person that actually starts the call – the girl in California in the illustration I gave.<sup>35</sup>  
335 Calls are analyzed on an end-to-end basis based on the originating caller's (the girl's)  
336 NPA-NXX and the called party's (the girl's grandmother in Chicago) NPA-NXX. Just as  
337 the FCC found when it rejected Halo's position in *Connect America Fund*, Transcom's  
338 supposed "re-origination" of a call with wireless equipment "in the middle of the call  
339 path does not convert a wireline-originated call [*i.e.*, a landline-originated call] into a  
340 CMRS-originated call."<sup>36</sup>

341 Bear in mind that Halo is not claiming that Transcom is originating these calls in  
342 the usual sense of the word. Rather, Halo is claiming that because Transcom is an ESP,  
343 Transcom (i) is exempt from access charges; (ii) is thus treated as an end user; and (iii) is

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<sup>35</sup> Neinast Direct at 21, lines 424-432.

<sup>36</sup> See *id.* at 23, lines 466-470, quoting *Connect America Fund*.

therefore a call originator. Once one decides, as the Commission should, that Transcom is not an ESP, that is the end of the discussion – there is nothing left of Halo’s argument.

**Q. MR. WISEMAN OBJECTS TO THE TERM “RE-ORINATION.” HE STATES THAT HALO IS NOT ARGUING THAT TRANSCOM “RE-ORIGINATES” CALLS, BUT RATHER THAT AS AN ESP, TRANSCOM “INITIATES A FURTHER COMMUNICATION.”<sup>37</sup> DO YOU ACCEPT THE DISTINCTION HE IS MAKING?**

**A.** Halo is free to use whatever words it wishes in making its own arguments. I would note, however, that the language in our ICA provides that Halo must send AT&T Illinois only traffic that “*originates* through wireless transmitting and receiving facilities.”<sup>38</sup> So if Halo insists that what Transcom is doing is *not* an origination, that necessarily means that the origination happens at the start of the call – which AT&T of course maintains is the one and only origination. Because that origination is not wireless for many of the calls Halo delivers to AT&T, Halo clearly is breaching the ICA.

As Mr. Wiseman acknowledges, he insists on the phrase “initiates a further communication” because that is the phrase the D.C. Circuit used in the *Bell Atlantic* decision when it talked about dial-up internet traffic terminating at the Internet Service Provider (“ISP”), which then initiated a further communication to the World Wide Web.<sup>39</sup> As AT&T Illinois will explain in its legal briefs, the *Bell Atlantic* decision does not help Halo here, because, among other reasons, there is a tremendous difference

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<sup>37</sup> Wiseman Testimony at 36, line 21 - 37, line 2.

<sup>38</sup> I refer to the ICA Amendment quoted in Mr. McPhee’s direct testimony, at 13, lines 252-257.

<sup>39</sup> Wiseman Testimony at 37, lines 2-4.

between the situation that case addressed and the situation presented here. For one thing, when an ISP's customer dials a seven-digit phone number to reach the ISP in order to go onto the internet, the customer knows he is calling the ISP for that purpose. In contrast, when the girl in California calls her grandmother in Chicago, the girl is not making a call to Transcom; she does not even know Transcom exists. AT&T will explain the legal significance of this important factual distinction in its briefs.

All that said, I do not believe it makes any difference whether we call it a "re-origination," a "second origination" or the "initiation of a further communication," because whatever we call it, Transcom does not do it.

**Q. MR. WISEMAN STATES THAT HE IS ADVISED BY COUNSEL THAT THE "FCC APPARENTLY DISAGREES WITH THE D.C. CIRCUIT'S HOLDING THAT ESPS CONSTITUTE AN END POINT FOR RECIPROCAL COMPENSATION PURPOSES, AND WHEN AN ESP 'ORIGINATES A FURTHER COMMUNICATION' IT IS A SEPARATE COMMUNICATION."<sup>40</sup> DOES AT&T SHARE THAT VIEW?**

**A.** Mr. Wiseman is certainly correct that the FCC has ruled that ESPs do not constitute an end point, and that ESPs do not "originate" further communications, and that is fatal to Halo's position here. AT&T Illinois does *not* agree, however, that that means the FCC disagrees with the D.C. Circuit's holding in *Bell Atlantic*. Having staked out the position that that *Bell Atlantic* holds that ESPs are always call originators and call terminators, and having acknowledged that the FCC has concluded that ESPs are not call originators, Mr. Wiseman is forced to say that the FCC disagrees with *Bell Atlantic*. But the FCC certainly did not *say* it was disagreeing with the D.C. Circuit, and AT&T does not believe

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<sup>40</sup> *Id.* at 39, line 22 - 40, line 1.

387 it was. Rather, Halo was simply wrong when it read *Bell Atlantic* as supporting its  
388 position.

389 **Q. WHAT IF THE COMMISSION WERE TO DECIDE THAT TRANSCOM IS AN**  
390 **ESP? WOULD IT FOLLOW THAT TRANSCOM IS ORIGINATING ALL**  
391 **THESE CALLS, AS HALO CLAIMS?**

392 A. Not in my view, as I have explained.<sup>41</sup> That is in large part a legal question, however,  
393 which AT&T Illinois will address in its briefs.

394 **Q. YOU SAY THAT THE FCC REJECTED HALO'S THEORY IN *CONNECT***  
395 ***AMERICA FUND*, BUT STARTING AT PAGE 64 OF HIS DIRECT**  
396 **TESTIMONY, MR. WISEMAN SEEMS TO SUGGEST THAT MAY NOT BE**  
397 **THE CASE. HOW DO YOU RESPOND?**

398 A. From my perspective, the most important statement in Mr. Wiseman's testimony about  
399 the FCC's Order – and perhaps the most straightforward statement – is this: “We  
400 acknowledge that . . . apparently [the FCC] now believes ESPs are exchange access  
401 customers and *do not originate calls*.”<sup>42</sup> With this acknowledgment that the FCC  
402 believes ESPs do not originate calls, I do not see how Halo can maintain its position that  
403 the calls we are discussing are not landline-originated calls on the theory that Transcom  
404 originates them.

405 **Q. BUT DOESN'T MR. WISEMAN QUALIFY HIS ACKNOWLEDGEMENT OF**  
406 **THE FCC'S BELIEF?**

407 A. Yes. Mr. Wiseman, in the same sentence I just quoted, says that the FCC's belief that  
408 ESPs do not originate calls results from the fact that the FCC has “reversed course from

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<sup>41</sup> Neinast Direct at 29, line 591 - 30, line 610.

<sup>42</sup> Wiseman Testimony at 50, lines 15-16 (emphasis added).

409 prior precedent.” He also states that the fact that the FCC believes ESPs do not originate  
410 calls “does not resolve the ‘end user’ question,” and does not mean that ESPs are  
411 common carriers or provide telecommunications services.<sup>43</sup> As to the first point, AT&T  
412 does not believe the FCC’s rejection of Halo’s position is a rejection of prior precedent;  
413 rather, it is an application of prior precedent, as AT&T Illinois will show in its legal  
414 briefs. Scott McPhee discusses this in his rebuttal testimony, at pages 7-9.

415 As for Mr. Wiseman’s second point, this Commission does not need to resolve the  
416 “end user” question or decide whether Transcom is a common carrier or provides  
417 telecommunications services in order to decide that Halo has breached the parties’ ICA  
418 by sending AT&T landline-originated traffic. If Transcom is not originating calls, as  
419 Halo acknowledges the FCC found, then all those landline-originated calls, like the girl’s  
420 call to her grandmother, remain landline-originated and were delivered in breach of the  
421 ICA.

422 **Q. MR. JOHNSON CLAIMS THAT AT&T’S WITNESSES AGREE THAT “UNDER**  
423 **THE FCC’S VIEW, END USERS USE CUSTOMER PREMISE EQUIPMENT (OR**  
424 **CPE) TO ‘ORIGINATE’ TELECOMMUNICATIONS TO**  
425 **TELECOMMUNICATIONS CARRIERS AND TELECOMMUNICATIONS**  
426 **CARRIERS ‘TERMINATE’ TELECOMMUNICATIONS TO END USERS’**  
427 **CPE.”<sup>44</sup> IS THAT TRUE?**

428 **A.** No. Neither Mr. McPhee nor I used the words Customer Premises Equipment or the term  
429 CPE in our direct testimony, and neither of us made any reference to any such

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<sup>43</sup> *Id.* at 50, lines 16-18.

<sup>44</sup> Johnson Testimony at 5, lines 4-6.

equipment.<sup>45</sup> Furthermore, the FCC defines Customer Premises Equipment as “equipment employed on the premises of a person (other than a carrier) to originate, *route*, or terminate telecommunications.”<sup>46</sup> I take it that Mr. Johnson’s point is that if Transcom’s equipment is Customer Premises Equipment (and I express no view on whether it is), then Transcom necessarily terminates and originates all the telecommunications that pass through it. According to the FCC’s definition, that is not the case. Assuming that Transcom does have Customer Premises Equipment, that equipment can be used to *route* calls.

**Q. SINCE NEITHER YOU NOR MR. MCPHEE MADE ANY MENTION OF CPE IN YOUR DIRECT TESTIMONY, I TAKE IT THAT MR. JOHNSON IS ALSO WRONG WHEN HE STATES THAT YOU AGREED IN YOUR DIRECT TESTIMONY THAT “TRANSCOM’S WIRELESS TRANSMITTING AND RECEIVING FACILITIES ARE CPE”?**<sup>47</sup>

A. Correct. We agreed to no such thing in our direct testimony. I am expressing no opinion on whether Transcom’s equipment is CPE. As I just noted, however, I do not believe that Halo can get where it wants to get by engaging in a logic chain that says (i) Transcom’s equipment is CPE, (ii) CPE terminates and originates communications, and, therefore, (iii) Transcom originates all the traffic that Halo delivers to AT&T Illinois. The chain falls apart at step (ii) in light of the FCC’s definition of CPE.

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<sup>45</sup> I know that Mr. Johnson claimed to find these agreements “buried” in our testimony (Johnson Testimony at 4, line 17), but this one isn’t even close.

<sup>46</sup> 47 C.F.R. § 6.3(c) (emphasis added).

<sup>47</sup> Johnson Testimony at 5, line 7.



449 **Q. MR. JOHNSON ALSO STATES THAT AT&T'S WITNESSES AGREE THAT**  
450 **"TRANSCOM'S ENHANCED SERVICES CHANGE THE CONTENT OF THE**  
451 **COMMUNICATIONS IT RECEIVES FROM ITS CUSTOMERS."**<sup>48</sup> **IS THAT**  
452 **TRUE?**

453 A. No. We have consistently maintained that Transcom does not provide enhanced services,  
454 so we certainly haven't agreed (even implicitly or "deeply buried," as Mr. Johnson put it)  
455 to anything about any such enhanced services. Nor have we agreed that Transcom  
456 changes content. On the contrary, the content of the communication remains unchanged.

457 **Q. WHAT ABOUT THE OTHER TWO THINGS THAT MR. JOHNSON CLAIMS**  
458 **YOU HAVE AGREED TO?**<sup>49</sup>

459 A. We did not agree to either of those propositions, either.

460 **Q. MR. WISEMAN ANALOGIZES THE HALO-TRANSCOM ARRANGEMENT TO**  
461 **A "LEAKY PBX."**<sup>50</sup> **DOES THE ANALOGY SUPPORT HALO'S POSITION**  
462 **HERE?**

463 A. No. The so-called "leaky PBX" situation arises when someone using a work phone or  
464 home phone dials into her company's PBX and then, usually by dialing an access code or  
465 another number, has the PBX send the call to another company PBX via a private line  
466 connection between the PBXs. The second PBX then "leaks" the call into the local  
467 exchange for termination, and the call appears to be local (that is, it looks like it came  
468 from the local PBX), so the LEC does not know to apply access charges.<sup>51</sup> Mr.

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<sup>48</sup> *Id.* at 4, lines 19-20.

<sup>49</sup> *Id.* at 4, line 21 - 5, line 3.

<sup>50</sup> *E.g.* Wiseman Testimony at 50, lines 9-14.

<sup>51</sup> *In the Matter of Amendment of Part 69 of the Commission's Rules Relating to Private Networks and Private Line Users of the Local Exchange*, 2 FCC Rcd. 7441, ¶ 15 (rel. Dec. 18, 1987); NEWTON'S TELECOM DICTIONARY at 426 (18<sup>th</sup> ed.) (definition of "Leaky PBX").

Wiseman's comparison to a leaky PBX is telling, because the FCC long ago recognized that leaky PBXs – just like Halo's and Transcom's current scheme – constituted a form of "access charge avoidance" that needed correction.<sup>52</sup> The FCC dealt with the Leaky PBX situation by imposing a \$25 per month surcharge on all jurisdictionally interstate special access lines that do not fall within specific exceptions.

In any event, the Halo/Transcom arrangement, though similar in purpose to leaky PBX, is different in important ways. Most important, in the leaky PBX situation the person who originates the call knows she is using a company line and the company remains responsible to pay for the line and the call. With Halo and Transcom, by contrast, the party originating the call has no idea that Halo or Transcom will be involved in carrying the call and Halo and Transcom have no contractual or other relationship with that caller.

**Q. MR. JOHNSON ARGUES AT LENGTH THAT TRANSCOM IS NOT A "TELECOMMUNICATIONS CARRIER."<sup>53</sup> DO YOU AGREE?**

A. Whether Transcom is or is not a "telecommunications carrier" as that term is defined in the statute Mr. Johnson quotes is a legal question. Indeed, Mr. Johnson acknowledges that much of what he says on the subject is "on the advice of counsel." Mr. Johnson's argument that Transcom is not a carrier, however, is merely a round-about way of restating Halo's contention that Transcom is an ESP and, therefore, an end-user that originates communications. Assuming the Commission rejects that argument, as it

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<sup>52</sup> *MTS and WATS Market Structure*, 97 FCC Rcd. 682, ¶ 87 (1983).

<sup>53</sup> Johnson Testimony at 20-23.

should, the Commission will have no occasion to decide whether Transcom is a carrier. That said, inasmuch as Transcom is not, in my view, an ESP, I continue to believe that Transcom is a carrier.

**VI. HALO PROVIDED INACCURATE CALL DETAIL.**

**Q. IN YOUR DIRECT TESTIMONY, YOU SHOWED THAT HALO HAS INSERTED CHARGE NUMBER (“CN”) DATA IN A MANNER THAT MAKES TOLL CALLS APPEAR TO BE LOCAL, APPARENTLY SO HALO COULD AVOID PAYING THE APPLICABLE ACCESS CHARGES. DOES HALO ADMIT DOING THIS?**

A. Yes. As I discussed, when used legitimately, a Charge Number (“CN”) appears on a very small number of calls and is typically within the same NPA-NXX as the Calling Party’s Number. Halo, however, inserted what it alleges is a Transcom CN on *all* of the calls it was sending to AT&T Illinois, even though the calling party had not asked or arranged to have a CN inserted. Mr. Wiseman admits Halo did this, saying that Halo “populated Transcom’s Billing Telephone Number (‘BTN’) in the SS7 Charge Number (‘CN’) address signal.”<sup>54</sup> I am aware of no legitimate reason to insert CN in this manner. Halo has stated that it stopped inserting the Transcom CN as of December 29, 2011, but that does not undo Halo’s prior misconduct.

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<sup>54</sup> Wiseman Testimony at 52, lines 15-17.

507 **Q. MR. WISEMAN, HOWEVER, STATES THAT HALO INSERTED THE**  
508 **TRANSCOM CN INTO THE CALL DETAIL “SO HALO COULD CORRECTLY**  
509 **BILL SERVICES, AND ASSOCIATE ITS CUSTOMER CALLS TO**  
510 **TERMINATING LECS, WHERE DIFFERENT TERMINATING CHARGES ARE**  
511 **IN EFFECT.”<sup>55</sup> IS THAT A PERSUASIVE EXPLANATION?**

512 A. I do not believe it is. I cannot imagine why Halo would need to insert a Transcom CN  
513 into the call detail in order for Halo to correctly bill Transcom, which is its only  
514 customer. And I have no idea what Mr. Wiseman means when he says Halo inserted the  
515 CN so Halo could “associate its customer [Transcom] calls to terminating LECs, where  
516 different terminating charges are in effect.” That makes no sense to me.

517 **Q. YOU SAY THAT HALO WAS DISGUIISING THE TRUE NATURE OF ITS**  
518 **TRAFFIC, BUT WASN’T AT&T ILLINOIS ABLE TO DISCERN THE TRUE**  
519 **NATURE OF THE TRAFFIC BY LOOKING AT THE ORIGINATING CPN AND**  
520 **USING THE PROCESS YOU AND MR. MENSINGER USED FOR YOUR CALL**  
521 **ANALYSES?**

522 A. Yes, but that isn’t the point. As I explained in my direct testimony,<sup>56</sup> Halo was  
523 disguising the true nature of its traffic *from our billing systems*.

524 **Q. BUT MR. WISEMAN SAYS THAT AT&T’S BILLING SYSTEMS COULD NOT**  
525 **HAVE BEEN DECEIVED, BECAUSE AT&T ILLINOIS DOES NOT DO “CALL**  
526 **BY CALL” RATING.<sup>57</sup> HOW DO YOU RESPOND?**

527 A. It is true that AT&T Illinois does not bill Halo by identifying each individual call as local  
528 or long distance and billing accordingly; rather, AT&T Illinois bills carriers with CMRS  
529 ICAs, such as Halo, according to factors – in this instance, the 100% intraMTA factor

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<sup>55</sup> *Id.* at 54, lines 4-6.

<sup>56</sup> Neinast Direct at 32, lines 665-672.

<sup>57</sup> Wiseman Testimony at 53, lines 15-17.

that Halo gave AT&T Illinois (*i.e.*, Halo's representation that all of Halo's traffic is intraMTA wireless traffic). What Mr. Wiseman overlooks, however, is that the ICA allows the factor to be adjusted from time to time to reflect real world traffic flows, and by inserting the Transcom CN into the call detail, Halo caused the billing records to give the inaccurate impression that all of Halo's traffic was indeed intraMTA traffic. That, under other circumstances, would have deterred AT&T from seeking to adjust the billing factors. It was only because our suspicions were aroused and we checked the SS7 records (as opposed to the billing records) that we were able to confirm that Halo was in fact sending us a great deal of traffic that was not intraMTA.

**Q. HAS THE FCC RECOGNIZED THAT INSERTING A CN INTO THE CALL RECORD, AS HALO DID, CAUSES PROBLEMS FOR TERMINATING CARRIERS?**

A. Yes. In *Connect America Fund*, the FCC addressed the practice of manipulating CN that is sent to a terminating carrier. The FCC referred to this as "the problem of CN number substitution that disguises the characteristics of traffic to terminating carriers," and found that "CN substitution is a technique that leads to phantom traffic."<sup>58</sup> The FCC therefore stated that "the CN field may only be used to contain a calling party's charge number, and that it may not contain or be populated with a number associated with an intermediate switch, platform, or gateway, or other number that designates anything other than a calling party's charge number."<sup>59</sup> Yet that is precisely what Halo did.

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<sup>58</sup> *Connect America Fund*, ¶ 714.

<sup>59</sup> *Id.*

550 Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?

551 A. Yes.

### **CERTIFICATE OF SERVICE**

I hereby certify that on May 25, 2012, I served a copy of the foregoing document on the individuals listed on the attached Service List via e-mail.

/s/ Dennis G. Friedman

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